

FILE COPY

No. **329**

Office - Supreme Court, U. S.
<b>FILED</b>
SEP 5 1947
CHARLES ELMORE DROPLEY

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1947

ANNE JOHNSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit  
and  
BRIEF IN SUPPORT THEREOF**

JOHN F. GARVIN

955 Dexter Horton Building,  
Seattle, Washington

*Counsel for Petitioner.*

H. SYLVESTER GARVIN

ANTHONY SAVAGE

955 Dexter Horton Building,  
Seattle 4, Washington.

*Of Counsel for Petitioner.*

No. ....

---

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1947**

---

**ANNE JOHNSON,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit  
and  
BRIEF IN SUPPORT THEREOF**

---

**JOHN F. GARVIN**

**955 Dexter Horton Building,  
Seattle, Washington**

*Counsel for Petitioner.*

---

**H. SYLVESTER GARVIN**

**ANTHONY SAVAGE**

**955 Dexter Horton Building,  
Seattle 4, Washington.**

*Of Counsel for Petitioner.*

---

## INDEX

## Page

PETITION FOR WRIT OF CERTIORARI.....	v1
Statement of the Case and the Matters Involved.....	1
Jurisdictional Statement .....	6
1. Jurisdiction of the Court.....	6
2. The Decision and Judgment of the Circuit Court of Appeals .....	6
3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof .....	7
The Questions Presented.....	7
Points Relied Upon for the Issuance of the Writ of Certiorari .....	9
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CER- TIORARI .....	11
Opinions Below .....	11
Jurisdiction .....	11
Statement of the Case.....	12
Specification of Errors .....	12
Constitutional and other Provisions Involved.....	13
Argument .....	13
Summary of Argument .....	13
Point One .....	13
Point Two .....	17
Appendix .....	22

## TABLE OF CASES

<i>Agnello v. U. S.</i> , 269 U.S. 20.....	7, 9, 13, 14, 17
<i>Atkinson v. U. S.</i> , 297 U.S. 157.....	21
<i>Berger v. U. S.</i> , 295 U.S. 78.....	7, 9, 13, 17
<i>Brown v. U. S.</i> (C.C.A. 3) 83 F.(2d) 383.....	13
<i>Byars v. U. S.</i> , 273 U.S. 28.....	7, 9, 13, 14, 17
<i>Go-Bart Co. v. U. S.</i> , 282 U.S. 344.....	14, 17
<i>Harris v. U. S.</i> decided May 5, 1947.....	13
<i>Henderson v. U. S.</i> (C.C.A. 4) 12 F.(2d) 528.....	9, 17
<i>Lee v. U. S.</i> , 83 F.(2d) 195.....	9, 15, 16
<i>Lefkowitz v. U. S.</i> , 285 U.S. 452.....	7, 13, 14, 17

## TABLE OF CASES

	<i>Page</i>
<i>Lowdon v. U. S.</i> , 149 Fed. 673.....	20
<i>Pierce v. U. S.</i> (C.C.A. 6) 86 F.(2d) 949.....	9, 13, 21
<i>Read v. U. S.</i> , 42 F.(2d) 636.....	21
<i>Sunderland v. U. S.</i> (C.C.A. 8) 19 F.(2d) 202.....	9, 20
<i>Taliaferro v. U. S.</i> , 47 F.(2d) 699.....	20
<i>Taylor v. U. S.</i> , 286 U.S. 1.....	13, 15
<i>U. S. v. Kaplan</i> (C.C.A. 2) 89 F.(2d) 869.....	13, 15, 16
<i>Viereck v U. S.</i> , 318 U.S. 237.....	7, 9, 13
<i>Weathers v U. S.</i> (C.C.A. 5) 117 F.(2d) 585.....	9, 13, 18

## STATUTES

18 U.S.C.A. following §688.....	6, 11, 16, 20, 23
21 U.S.C.A. §174.....	2, 22
26 U.S.C.A. §2553a.....	2, 22
28 U.S.C.A., §347.....	6, 11

## CONSTITUTION

United States Constitution, Fourth Amendment.....	22
---	----

## COURT RULES

Federal Rules of Criminal Procedure, Rule 41(e) (18 U.S.C.A. following 688).....	6, 11, 16, 20, 23
Federal Rules of Criminal Procedure, Rule 51 (18 U.S.C.A. following 688).....	23
Federal Rules of Criminal Procedure, Rule 52 (b) (18 U.S.C.A. following 688).....	23

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1947**

**ANNE JOHNSON,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

No. ....

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Ninth Circuit**

*To The Honorable Fred M. Vinson, Chief Justice of the  
United States, and to The Honorable Associate Jus-  
tices of the Supreme Court of the United States:*

The petition of Anne Johnson for a Writ of certi-  
orari to the United States Circuit Court of Appeals  
for the Ninth Circuit respectfully shows:

**STATEMENT OF THE CASE AND THE MATTERS  
INVOLVED**

The petitioner was convicted in the District Court  
of the Western District of Washington, Northern Di-  
vision, on four counts of an indictment, two of which  
charged her with purchasing certain amounts of smok-  
ing opium and Yen Shee and two of which accused her  
with receiving and concealing the same amounts of  
opium and Yen Shee which had theretofore been un-  
lawfully imported into the United States. Title 26,

U.S.C.A., 2553a and Title 21 U.S.C.A. Sec. 174 (R. 2, 20).

The petitioner, Anne Johnson, owned and operated the Europe Hotel in the city of Seattle, Washington. On the night of April 8th, 1946, at approximately 8:00 o'clock in the evening, one Gilbert T. Belland, a city of Seattle police officer assigned to the Federal Narcotics squad, was advised by a confidential informer that there were unknown persons smoking opium in the Europe Hotel at the time (R. 38). Belland then got in touch with four Federal Narcotic agents and communicated to them the information he had received. The officers first completed another assignment and then proceeded to the Europe Hotel, arriving at approximately 9:00 o'clock. They made no attempt to obtain either a warrant for the petitioner's arrest nor a search warrant authorizing the invasion of her room.

Upon arrival, two of the officers entered the hotel and proceeded to go upstairs. They noticed a strong odor of opium which lead them to the room of the petitioner (R. 38). One of the officers was stationed on a fire escape which overlooked the only window of the room. Another officer was left at the entrance below. Belland then knocked on the petitioner's door and, in response to her inquiry, stated that he was Detective Lieutenant Belland. He was asked to wait a minute and during the interval he heard some shuffling or noise inside. Thereafter the petitioner opened the door and the officers informed her that they wished to talk about the opium smell in the room.

In addition they stated that they wanted her to consider herself under arrest because they were going to search the room (R. 39).

Up to the time the officers entered the hotel, knocked on the petitioner's door and identified themselves as officers of the law, they had not seen the petitioner nor did they know whether anyone was in the room, nor, were they able to tell whether opium was being smoked at the time of their arrival or whether someone had smoked it an hour or two before and departed the scene (R. 74). Nor, was there any contraband in sight at the time the door was opened. All the evidence, which consisted of a small quantity of opium, a small quantity of Yen Shee, and smoking paraphernalia, was concealed under the covers of the petitioner's bed and was not found for several minutes after the officers began the search (R. 98, 101).

The petitioner testified that the articles found belonged to a former friend of hers who had been suffering from pulmonary tuberculosis and heart trouble (he had died before the case came on for trial); that she believed he was using narcotics under instructions from his doctor and that she believed the opium outfit was legal with her friend because he was under a doctor's care (R. 118, 119, 128, 132).

Prior to the trial the petitioner moved to suppress the evidence seized in her bedroom because the search and seizure was without warrant and in violation of her constitutional rights (R. 4). Three of the Government agents filed counter-affidavits in resistance to the motion. In all three of the affidavits the officers

swore to receiving information that certain unknown persons were smoking opium in the Europe Hotel and that they had been led to the petitioner's door by their sense of smell (R. 10 11, 12, 13, 14 and 15). Not one of those officers mentioned hearing any noise of any kind prior to the time petitioner opened her door in response to Officer Belland's knock. The Trial Court, after considering the motion, all of the affidavits and the oral argument of counsel denied the petition (R. 19).

Thereafter the petitioner objected to the introduction of the articles seized (R. 41, 107) and at the conclusion of the Government's case and at the close of all the testimony challenged the sufficiency of the evidence and moved the court for a directed verdict because the evidence introduced against her was seized in violation of her constitutional rights (R. 107, 165).

The United States Attorney, in his closing arguments to the jury, repeatedly and without any justification therefor, accused defense counsel of having made up the story of the defense and of having persuaded the petitioner to sign and swear to a false affidavit. The accusations ranged from fabricating the story and doing most of the testifying, to putting the words in the petitioner's mouth.

"He (Mr. Onstad) made up the story and did most of the testifying rather than his client in telling what acutally happened up there." (R. 192)

Again at pages 193 and 194 of the Record, he made

these truly shocking charges of criminal misconduct on the defense attorney's part:

"I submit that this affidavit which he read to you—he made it up—he made up the story \* \* \*. And he gets her to sign and notarize it \* \* \*. That is his story. He is the one who is doing the testifying. It wasn't his defendant's or client's. He dictated this, I believe, and had her sign."

Once more at page 194 of the Record:

"His story was that it (suitcase) was full of men's clothing because he is trying to place it in the hands of somebody who is dead and can't speak for himself."

Yet, once more (R. 197):

"There is only one story here and that is the story of Mr. Onstad, because he is doing the testifying. He is the one who made up that story—it wasn't the defendant at all, and, this man's death was just a convenience to make it seem better \* \* \*. She says he did and he put the words in her mouth."

Again:

"If he is not familiar with narcotic cases, he wouldn't have got up and made the story he did without bringing a doctor in." (R. 195)

In addition the United States Attorney stated as facts mere matters of opinion which had no foundation in the evidence, and repeatedly in other ways, sought to prejudice the petitioner in the jury's eyes (R. 170, 172, 173). It is true that defense counsel offered no objection or saved any exception nor requested any cautionary instruction, yet it is likewise

true that the court, did not of its own motion interfere in the slightest degree but rather adopted and approved the United States Attorney's conduct and language in the following instruction:

Counsel in the case on both sides have brought before the court and jury all of the admissible evidence that they know of to enable the jury and the court to perform their respective functions. The court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge, what more could be done to properly enable the jury to perform its duty (R. 208).

### **JURISDICTIONAL STATEMENT**

#### **1. Jurisdiction of the Court.**

The jurisdiction of this Court is invoked under Section 240a of Judicial Code as amended (28 U.S.C.A., sec. 347). See also the Rules of Practice and Procedure, in Criminal Cases brought in the District Courts of the United States and the Supreme Court of the District of Columbia (18 U.S.C.A. following section 688).

#### **2. The Decision and Judgment of the Circuit Court of Appeals.**

The decision and judgment of the Circuit Court of Appeals was rendered on June 20, 1947 (R. 223). The Petition for Rehearing was denied on August 15, 1947 (R. 224). This petition, with supporting brief, and the certified record are filed within thirty days next after denial of Petition for Rehearing.

### 3. Basis Upon Which It Is Contended the Supreme Court Has Jurisdiction and Cases in Support Thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

a. The opinion of the Circuit Court of Appeals upholds a conviction of the petitioner upon a record which shows that a search and seizure of her private room was made in violation of her rights under the Fourth Amendment to the Constitution of the United States. *Agnello v. U. S.*, 269 U.S. 20; *Lefkowitz v. U. S.*, 285 U.S. 452.

b. The opinion of the Circuit Court of Appeals approved the conviction of the petitioner which was obtained chiefly by the prejudicial and inflammatory argument of the United States Attorney. *Berger v. U. S.*, 295 U.S. 78, and *Viereck v. U. S.*, 318 U.S. 237.

c. The opinion of the Circuit Court upholds the conviction of the petitioner upon a record which shows that evidence unlawfully seized in violation of the petitioner's constitutional rights was admitted over her objections. *Byars v. U. S.*, 273 U.S. 28.

### THE QUESTIONS PRESENTED

The questions presented and raised by this petition are as follows:

1. Whether Federal officers have the right to invade a person's living quarters in a hotel to make an arrest and thereafter a search and seizure without either a warrant of arrest or a search warrant, when the only basis for their action was an informer's tip

that unknown persons were smoking opium in the hotel and the officer's sense of smell.

2. Whether the trial court upon the petitioner's motion to suppress evidence seized from her sleeping room and in violation of her rights under the 4th and 5th Amendments to the Constitution, which motion was heard prior to trial upon affidavits and oral argument, should not have ordered the evidence articles seized suppressed for use as evidence, the counter-affidavits of the Government officers showing that they justified their arrest, search and seizure upon the tip of an informer and a sense of smell.

3. Whether the United States Attorney in his argument to the jury could fairly and without prejudice repeatedly accuse defense counsel with (1) fabricating the petitioner's story (2) persuading the petitioner to sign and swear to a false affidavit, (3) doing all the testifying, (4) putting the false words in the petitioner's mouth, (5) accusing the petitioner with the *fact* of falsifying in other instances in the case—all without any foundation—even though defense counsel failed to object or except to such argument.

## POINTS RELIED UPON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI

1. The opinion of the Appellate Court upholding the search and seizure is in direct conflict with applicable decisions of this court such as *Agnello v. U. S.*, 269 U. S. 20; *Byars v. U. S.*, 273 U.S. 28. And it is in conflict with comparable decisions of other Circuit Courts of Appeals such as *U. S. v. Lee* (C.C.A. 2) 83 F.(2d) 195. *Henderson v. U. S.* (C.C.A. 4) 12 F. (2d) 528.

2. The majority opinion approving the prejudicial argument of the United States Attorney is in direct conflict with applicable decisions of this court such as *Berger v. U. S.*, 295 U.S. 78; *Viereck v. U. S.*, 318 U.S. 237; and it is in direct conflict with comparable decisions of other Circuit Courts of Appeals such as *Weathers v. U. S.* (C.C.A. 5) 117 F.(2d) 585; *Pierce v. U. S.* (C.C.A. 6) 86 F.(2d) 949; *Sunderland v. U. S.* (C.C.A. 8) 19 F.(2d) 202.

3. Each of the matters passed on in the opinion of the Circuit Court of Appeals is an important question of general law and decided in a way not tenable and in conflict with the weight of authority.

4. The opinion of the Circuit Court so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power and supervision.

Wherefore, and for the reasons herein stated, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Circuit

Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, Seattle, Washington,

August 28, 1947.

ANNE JOHNSON,

*Petitioner.*

JOHN F. GARVIN

*Counsel for Petitioner.*

H. SYLVESTER GARVIN

ANTHONY SAVAGE

*Of Counsel for Petitioner.*